REPORT

OF THE CASE OF THE

Commonwealth of Pennsylvania,

VERSUS

JOHN SMITH, Esq.

MARSHAL OF THE UNITED STATES, FOR THE DISTRICT OF PENNSYLVANIA.

CONTAINING

The Speeches of the Attorney General and Jared Ingersoll, Esq. on behalf of the Commonwealth, and William Lewis, Esq. on the part of the Defendant.

AND ALSO THE OPINION OF THE

HONORABLE WILLIAM TILGHMAN, Esq.

Chief Justice of the State of Pennsylvania.

BY A MEMBER OF THE BAR OF PHILADELPHIA.

PHILADELPHIA:
PUBLISHED BY DAVID HOGAN, No 51,
SOUTH THIRD-STREET.
APRIL, 1809.
.....
T. T. STILES, PRINTER.

REPORT, &c.

Commonwealth
v.
John Smith, Esquire, Marshal of the United States, for the District of Pennsylvania.

This was a Habeas Corpus taken out of the Supreme Court of Pennsylvania, on the petition of Mrs. Elizabeth Sergeant, at the request of the Governor of the State, directed to John Smith, Esq. Marshal of the Pennsylvania District, returnable before the Hon. William Tilghman, Chief Justice of said Supreme Court of Pennsylvania, the 17th April, 1809.

WALTER FRANKLIN, Esq. Attor. Gen. of Pennsylvania, on behalf of Mrs. Sergeant, read the return to the *habeas corpus*, and the process referred to by it, and was about to proceed, when he was interrupted by Mr. Lewis, attorney for Mr. Olmstead; who said, it was far from his wish that the lady should be brought to court, but he wished it understood, that as the Marshal had returned, that he had brought her before the Chief Justice, he would hold him answerable on his return.

Mr. Jared Ingersoll, who was concerned with the attorney general, said, he understood the object of all parties was to obtain the opinion of the Chief Justice, and that it would be considered precisely as if Mrs. Sergeant was in court.

Mr. Lewis. We are anxious for an investigation, but as I have already suffered for indulgences granted in this case, I wish it understood, that I will trust the Commonwealth no more. I understand guards are still kept at the house, and most probably after the Chief Justice has decided, the Marshal will be resisted.

Mr. Ingersoll said, there was no necessity for harsh expressions. The only question was, whether the opinion of the Chief Justice could be taken without the party praying for the *habeas corpus* being present.

Chief Justice. If Mrs. Sergeant chooses to remain in custody until the matter is decided, I shall not insist on her being brought hither.

Mr. Dallas said, he had received notice as Attorney for the District; but as he did not consider the United States interested in the question, he did not attend in his official capacity; but as counsel for Mr. Smith the Marshal, (which he had been ever since he received his appointment of Marshal) he begged leave to suggest, that it would be proper for him to amend his return. That he had made the return with the best motives, under an impression, that it had been agreed by all parties, that the opinion should be taken without prejudice. Mr. Lewis now declares, that he means to consider it obligatory on him. That Mr. Smith had never been threatened, but there was a guard still kept at the house, and it had been published in one of the newspapers that he was to be resisted.

Mr. Lewis said, he had no objection to the return, which he had assisted in drawing np, being altered, but he wished it explicitly understood, that he would not wave a single legal advantage.

The return, as amended by the Marshal, is in these words:

"In obedience to the within command, I hereby certify to the Chief Justice of the Supreme Court of Pennsylvania, that Elizabeth Sergeant, and also Esther Waters, in the annexed schedule named, having neglected and refused to comply with, and perform the final sentence or decree in the same schedule, mentioned and referred to,—I, John Smith, Marshal of the United Sates for the Pennsylvania District, in obedience to a mandatory writ, issued from the District Court of the United States, for the same District, to me directed, and which is now exhibited to the honourable Judge, and a true copy whereof, is hereunto annexed, on the 15th day of the present month, April, attached and arrested the body of her, the said Elizabeth Sergeant; and in like manner, further certify, that the said Elizabeth Sergeant, and the said Esther Waters, still neglect, and refuse to comply with, and perform the said sentence or decree, and that I have the said Elizabeth Sergeant now in my actual custody

"7. That when any vessel or vessels shall be fitted out at the expense of any private person or persons, then the captures made, shall be to the use of the owner or owners of the said vessel or vessels; that where the vessels employed in the capture shall be fitted out at the expense of any of the United Colonies, then one third of the prize taken shall be to the use of the captors, and the remaining two thirds to the use of the said colony; and where the vessels so employed shall be fitted out at the continental charge, then one third shall go to the captors, and the remaining two thirds to the use of the United Colonies, provided nevertheless, that if the capture be a vessel of war, then the captors shall be entitled to one half of the value, and the remainder shall go to the colony or continent as the case may be, the necessary charges of condemnation of all prizes, being deducted before distribution made."*

In pursuance of the recommendation contained in these resolutions, the General Assembly of the Commonwealth of Pennsylvania passed an act for establishing a Court of Admiralty; some of the provisions of which, it becomes necessary to examine.

"That the judge of admiralty (in cases brought before him by libel) shall issue his warrant to the marshal of the court of admiralty, commanding him to summon and return a jury, who shall be sworn or affirmed, to return and give a true verdict, upon the libel according to evidence; and the finding of the jury shall establish the facts, without re-examination or appeal.

"The 7th section provides, "that in all cases of captures an appeal from the decree of the judge of admiralty of this State, shall be allowed to the continental Congress, or such person or persons as they may from time to time appoint, for hearing and trying appeals. Provided the appeal be demanded within three days after definitive sentence; and such appeal be lodged with the secretary of Congress within thirty days afterwards; and provided that the party appealing shall become bound before the said judge of admiralty, in such sum as he in his discretion may think proper, as security to prosecute the appeal to effect, &c."

* Folwell's Journals of Congress, vol. 1, page 260.

Thus it appears, that the Legislature of Pennsylvania adopted the mode of proceeding sketched out by Congress—so that the facts, as at common law, should be heard and established by a jury; but allowed of an appeal *on matters of law*, in perfect coincidence with the nature of a jury trial and strictly agreeing with the resolves of Congress already stated, which were the only ones upon the subject made in Congress. While these resolves and Act of Assembly were in force, the case of the Sloop Active occurred; the facts attending which, may be briefly stated as follows: [Mr. Franklin being asked by the Chief Justice to what he referred for these facts, answered, to the depositions taken on both sides.]

This sloop, of which John Underwood was master, bound for New-York with a cargo of rum, &c. was, in the month of September, 1778, met near the coast of New Jersey, by Captain Houston, in the Brigantine Convention, an armed vessel belonging to the State of Pennsylvania. Four of her mariners, who had fallen into the enemy's power in the West Indies, taken on board this vessel, for the purpose of navigating her to New-York, had risen some time before on the master, and confined him, his mate, and passengers in the cabin, by heaping a cable and other incumbrances over the stairway between the deck and the cabin. This produced a controversy, truly hostile; the prisoners below, who possessed the stock of victuals, water and ammunition, firing pistols through such openings as they were able, and those upon deck directing two three-pound cannons, for which they had a few cartridges, towards the cabin, but with little effect on either part. Meanwhile, Capt. Underwood, highly incensed at their attempt to take his vessel from him, entertained the desperate idea of blowing up the quarter-deck with gunpowder; from which, by the prudence and persuasion of his passengers, he was restrained, till a proposal of a less dangerous nature was essayed. This was the wedging of the rudder. Under this embarrassment the sloop was disabled and could not be steered. Whereupon a truce took place between the contending parties, and an agreement was made, that the rudder should be loosed, till the men upon deck, who dreaded

further imprisonment in New-York, might conduct the vessel towards the land, and when near enough, go off in *the boat, leaving the rest of the people on board in possession of her.* This accommodation being accordingly adjusted, had been so far proceeded on, that the land being near, Captain Underwood was expecting his enemy on deck immediately to quit the vessel; when Captain Houston approached, and put an end to the war on board, by seizing the *Active*, and sending her for Philadelphia. A libel was then exhibited in the Court of Admiralty, by Captain Houston, praying that the sloop and cargo might be adjudged to him, his officers, seamen, and the State, as their lawful prize. Against this, Gideon Olmsted and the three others concerned with him, opposed their claim, sueing for the prize, as having been effectually subdued and overcome by them. The controversy was, on the motion of the claimants, tried in the fairest manner before a very respectable struck jury. The result was a verdict, by which three quarters of the prize were given to the Convention, and the Girard privateer, her consort, and in sight at the time of seizure; and one quarter to the claimants; Olmsted and others, dissatisfied with the decree of the Judge, upon the verdict, appealed.

The committee of Congress, who sat upon these appeals, not only reversed the sentence of the Court below, but made a new adjudication, awarding the whole to Gideon Olmsted and his companions, and directed the Judge of Admiralty, to order their decree to be executed. This he declined to do, alledging that the act of Assembly of this state, under which he proceeded, had forbid all re-examination or appeal from *facts* found by a *jury*, and the verdict of course standing in full force, he could not execute a judgment contradictory to it.

On these facts, the first question which arises in this case, is—was the Judge correct in his determination, and had Olmsted a right to appeal from the verdict of a Jury. It appears to me, that on the strictest examination of the resolves of Congress, and the Act of Assembly of this State, establishing a Court of Admiralty, there will not be found the slightest inconsistency with, or repugnance to each other. It is well known, that the

two most general modes of trial now in use, are—a trial by *Witnesses* and a trial by *Jury*. In the former case, the evidence commonly taken by a register or examiner, in writing, is read before the Court, and the Court, unassisted by a jury, adjudge and decree thereon. Such in Great Britain is the course of their Admiralty and Ecclesiastical Courts. From judicatures proceeding after this manner, an appeal always lies to an higher Court, and this appeal is upon the whole controversy, as well *Fact* as *Law*. But with respect to trials by Jury, the favourite object of the common law, the law and the practice are *totally different*. In these trials, *appeals* from the decisions of a jury are never allowed. This point of law is stated very clearly by the Chief Justice of New-York, in the case of Forsey and Cunningham, which occurred in that State in the year 1764. [Here Mr. Franklin read the opinion of Judge *Jones*—see New-York Reports, page 27.] Formerly, the only method of reversing an error in the determination of facts found by a jury, was by attaint. This remedy being found oppressive and inconvenient, has gone out of use—In its stead, setting aside the verdict, is practised. [For the case in which this is done, Mr. F. read 3 Black. Com. 387—and Eulogium on Trial by Jury, page 378, 9. 380, 1.] Now there appears to me to be nothing in the case of the sloop Active, which rendered it improper for a determination of a jury. There was nothing to be decided by the laws of nations, or by treaties made with other nations. All agree that the Active was a *prize*—the only question was, who took her? who reduced her? This was a question of mere fact, and of that kind which was most properly referrable to the decision of a jury. The jury found that both parties aided, one as three-fourths; the other as one-fourth; and awarded accordingly. But it is contended, that Congress, from the nature of its power, had an exclusive jurisdiction in this case, and had an uncontrollable right to establish a Court of Appeal, for its final determination. By the resolves in Congress passed in 1775, it does not appear that Congress claimed any power to establish Courts of Admiralty in any of the states. It merely *recommended* to the several states to establish such Courts—or give juris-

diction to the Courts then in being, for the purpose of determining concerning the captures to be made, and to provide that all trials, in such case, be had by a jury, *under such qualifications, as to the respective Legislatures shall seem expedient.*—That in *all cases*, an appeal shall be allowed to the Congress, or such person or persons as they shall appoint, for the trial of appeals. In the first place, we contend that Congress could only mean in *all cases* where the *established principles of law permitted an appeal.* I have shewn that appeals are *never* allowed from the *verdict of a jury.* Congress could never mean to extend the right to such cases, but only to *points of law* determined by the *Judge*, without the intervention of a jury. A jury was not called in all Admiralty cases—facts were often admitted—and there were a vast variety of cases determined by the judge, without a jury—In each of these instances, an appeal was allowable, and perfectly satisfied the words and meaning of the resolves of Congress. But, at any rate, it was only a *recommendation* of Congress, which they had no power to *enforce*, and might be complied with or not, as suited the wishes or convenience of the several States. They might have *totally* refused to comply with it—or only *partially*—and might have constructed their Courts upon a different plan from that proposed or recommended by Congress. And the State which erected the Court of Admiralty, possessed the power likewise, to regulate the appellate jurisdiction from its decrees. But, by what instrument or agreement did Congress possess the power of receiving appeals from the State Courts of Admiralty—except in cases where such appeals were authorized by the State Legislature? At the time this case occurred, there was no instrument or express agreement for vesting it in Congress.—The power can therefore only be claimed on *implication* or *construction.* Now Pennsylvania, as a free and sovereign state, certainly retains all the powers which she did not *expressly surrender to the Union*—a state cannot cease to be sovereign without its own act, nor can sovereignty be asserted but upon a clear title. Whatever power Congress possessed, must have been derived from the *people.* If Congress had a right of erecting Courts of Appeal to review the decision of a jury in the Ad-

miralty Courts of the State of Pennsylvania, it must be in consequence of an *authority* derived from *Pennsylvania*.—If *all the other States* had concurred in giving the right to Congress, it could not have affected *Pennsylvania* without her *express consent*. We know that the powers of Congress, previously to the adoption of the Federal Constitution, were very much circumscribed, even in cases where it was necessary they should act. In the early stages of the revolution, they possessed no positive powers, by express delegation. When the war came on, they seized on such powers as the necessity of the case required to be exercised, but still the validity of the power depended on subsequent ratifications or universal acquiescence. Has Pennsylvania ever *ratified* or *acquiesced* in the power claimed by Congress in this case? A reference to facts, and official documents will show, that she has never for an instant acquiesced with, but has always opposed it *totis viribus* from the first time it was attempted to be exercised, to the present moment.

[For these documents read by Mr. Franklin, see Mr. Peters's Pamphlet, page 32 to 41—Folwell's Journals of Congress, volume 5. page 64, 5, 6 and 7—Resolution, of the general Assembly, ordering the payment of the money to George Ross, Journals, March 10, 1779. page 335.—Instructions from the Assembly to the Delegates of Congress, Journals of the Assembly, page 185, 6. January 31, 1780.—Journals of Congress, January 21, and March 30, 1784. volume 9th, page 27. 68, 9.]

It therefore appears to me, that as *no appeal* lay from the verdict of a *jury* in an *Admiralty case*, *no other Court had jurisdiction*—and that therefore the *decree* of the *District Court*, *and all proceedings under it*, *were absolutely null and void.*

The second point in this important case, arises from the circumstance of the money claimed by the state, being paid into the hands of the late Mr. Rittenhouse, deceased, then Treasurer of the Commonwealth. The facts attending this part of the case are briefly these—

[Here the Chief Justice asked Mr. Franklin to what he referred for these facts; he replied, the answer of the executrixes of Rittenhouse.]

Mr. David Rittenhouse being the Treasurer of the Commonwealth, the Legislature passed a resolution on the 29th of November, 1779, empowering George Ross, esq. judge of the Admiralty, to pay over the State's proportion of the proceeds of the sloop Active and cargo, into the hands of Mr. Rittenhouse, *as their Treasurer.*—The circumstances attending this payment, are stated in the answer of Mrs. Sergeant and Mrs. Waters, to the libel of Gideon Olmsted, filed May 27, 1802. [Read by Mr. Franklin, from Mr. Peters's pamphlet, page 66, 7, 8, 9.] After this payment therefore, it appears to me, that Mr. Rittenhouse could no longer be *personally* liable to Mr. Olmsted and the other libellants.—The money paid into *his hands* was paid into the *Treasury of the State*, and he had no other claim upon the amount, than to be indemnified against the consequences of the bond he had given to the judge of the Admiralty. While this state of things continued, an amendment was made to the Constitution of the United States, which declares, "that the judicial power of the United States shall not be construed to extend to any suit in Law or Equity, commenced or prosecuted against one of the United States, by citizens of another State, or by citizens or subjects of any foreign State." This amendment has been considered so extensive and imperative as to supersede the jurisdiction of the U. States' courts, in suits heretofore brought by individuals against States, as well as to prevent the institution of such *suits in future.* This was determined in the case of Hollingsworth and others, against the State of Virginia—3 Dall. 378. As it is a rule of law that a statute shall be construed according to its spirit, rather than its letter, there can be no doubt, that this amendment extends to all cases, in which a State is *interested*, as well as to those in which it is a party.—If this position be correct, can there be the slightest ground for contending, that by the making an *officer* or *agent* of the State, a defendant in the cause, when the *State alone* is interested in the event, and the *real party* in the suit, a State can in this *indirect way*, be debarred of her right, when she could not be sued *directly?* By such means as these, the object of the amendment of the Constitution would be completely defeated, and the Constitution itself become a dead letter. On this part of the case, the argu-

ments of the committee of the House of Representatives, appointed to investigate this subject, appear to me so conclusive, that I beg leave to read them as part of my argument, and as preferable to any observations which I could make on the occasion.

Mr. Lewis. Do you read this as part of your argument?

Mr. Franklin. I do.

Mr. Lewis. Do you consider yourself answerable for the truth of the report of the committee, in "The Democratic Press," of the 15th March, 1809?

Mr. Franklin. Of what I read.

"The second part of the case exhibits facts and circumstances of the deepest interest and concern to Pennsylvania. An attempt has been made by the district court, deriving its authority from the constitution of the United States, to enforce the decree of the committee of appeals, the jurisdiction of which, to reverse the facts established by a jury, *Pennsylvania* has so long resisted, and which even Congress, under the confederation, has so long abandoned; not only to enforce it, but to enforce it *ex parte;* without power to examine the merits, or to control its errors; without notice to the State, or consulting its interests; not only thus to enforce it, but to convert the treasurer and agent of the State acting under its immediate authority, into a *stake-holder*, as a mean to reach the funds of the State, and to affect its rights! If this can be done, the amendment had to the constitution would be a dead letter. The State can act, under its laws only by its agents. Its monies remain in the hands of its treasurers. If its officers can be converted by the decree of a judge, into *stake-holders*, there can, perhaps, be no possible case in which the constitution may not be evaded.

"It sufficiently appeared, in the answer to the libel, that Mr. Rittenhouse received the money as Treasurer of the State, for *the use of the State.* It appeared decisively on the public records of the commonwealth. But it is alledged, "that the amendment to the constitution simply provides, that no suit shall be commenced or prosecuted against a State. That in this case the suit was not instituted against the State, or its Treasurer, *but against the executrixes of David Rittenhouse.* That if the proceeds had been the actual property of *Pennsylvania*, how-

ever *wrongfully* acquired, the disclosure of that fact, would have presented a case, on which it is necessary to give an opinion." Such is the language of the Supreme Court of the United States! If the process and jurisdiction of the Admiralty Court will reach and extend over the proceeds of prize, found within the district, and individuals, no party to the original decree can be libelled against—is all investigation to be foreclosed? Or, if it be not in the nature of an original suit, but merely a proceeding to *enforce a decree* of a former court, in which captain *Josiah* and captain *Houston* were parties, why are captain *Josiah* and the representatives of captain *Houston* unheard in this strange proceeding?

"It is further alleged, and is made a ground of decision by the Federal Courts, "that the property which represented the Active and her cargo, was in possession, not of the State of *Pennsylvania,* but of David Rittenhouse as an individual; after whose death it passed, like other property, to his representatives. In answer to this, it is clear to your committee, that David Rittenhouse, could not have received a farthing of the money as David Rittenhouse, *but as treasurer of the State only*, and by order of the State. The moment it came into his hands, as treasurer, it was to every intent and purpose, in the coffers of the State. Although David Rittenhouse gave a bond to indemnify George Ross, yet that instant, the State became bound to indemnify David Rittenhouse, and the real party then interested was the Commonwealth of Pennsylvania. A treasurer, or other officer retaining the public monies, upon any pretence whatever, cannot, upon any principle, change the nature of the question. But in a case of such magnitude, it becomes a most sacred duty in the committee to lay before the house the adverse principles, in the strongest point of view; and we should endeavour to judge impartially and dispassionately; and with the stern dignity of a Roman Senate, on whose decrees the fate of nations may have depended—No less awful may be the question depending on our voice. By the highest judicial authority the question is declared to be at rest. That by the decree of reversal, the interest of the State of Pennsylvania in the Active and her cargo, was extinguished. That although Mr. Rittenhouse was treasurer of the State of Pennsylvania, and the bond of indemnity

which he executed, states the money to have been paid to him for the use of the State, it is apparent he held it in his own right, until he should be completely indemnified by the State; and that the evidence to this point was conclusive. That it did not appear that the original certificates were deposited in the State treasury, or in any manner designated, as the property of the State; or delivered over to his successor; and when funded, were funded in his own name, and the interest drawn by him: that the memorandum made by him at the foot of the list of certificates, in these words; "The above certificates will be the property of the State of Pennsylvania, when the State releases me from the bond B. gave in 1779, to indemnify George Ross, esq. judge of the admiralty, for paying the fifty original certificates into the *treasury*, as the State's share of the prize," demonstrates that he held the certificates as security against the bond he had executed, and that bond was obligatory, not on the State of Pennsylvania, but on David Rittenhouse, in his private capacity. This statement by the Court, as part of the broad ground on which they decided, may be plausible; may give colour to the decision; perhaps may be unanswerable. Yet it by no means appears to your committee, that he received it as a *stake-holder*, or upon a contingency—but for the use of the State, as its share of the prize: and even upon his own memorandum, so much relied on, it is stated that the certificates were paid into the treasury as the State's share of the prize; and as the State was bound to indemnify him, when he acted under its orders, the State would have of course, been the real party interested, in any suit which may have been commenced upon it. Your committee conceive the Court was not possessed of the whole state of the case; and they deem it necessary to bring before the house, the authority under which the treasurer acted, which proves explicitly how, and in what character he acted. In the minutes of the Supreme Executive Council is the following resolution: "Philadelphia, April 21st, 1779. Resolved, that David Rittenhouse, the treasurer, be directed to find sufficient security, to be approved of by the judge of the admiralty, for the share adjudged to the State, of the prize sloop Active, taken by the brigantine Convention, and the Gerard

privateer, and take up the money, which will exceed eleven thousand pounds, for the use of the State; one half of the sum allotted to the Convention, coming to the State." It here incontrovertibly appears, that he did not receive the money as a private individual, but for the use of the State, by the orders of the executive authority, and the bond which he executed, was executed by him, by the like authority, as agent and security for the State. Having thus received the money, previously the property of the State, by the decree of the Admiralty Court, as treasurer, no detention of it when he went out of office, ought in reason or principle to be considered as changing the nature of the original transaction. The Legislature, at their session, November 23d following, passed a resolution similiar to that of the Executive Council; and the act of February 26th 1801, still further corroborates all the former proceedings of the State.

" Your committee are also of opinion, that as the brigantine Convention, was the property of the State, as soon as judgment was pronounced upon the verdict of the jury, its interest attached upon its proportion of the prize; and as soon as it was received by the State treasurer, it was so much belonging to the State, actually in the treasury."

Mr. Franklin. This is the part I adopt as my argument.

Under every view of the subject, does it not manifestly appear, that the *United States* have acted in this case *without competent authority*—and that the *process*, issued by the *District Court, is absolutely null and void?* In order more fully to shew the sense of the Executive and Legislative bodies on this subject, I beg leave to read the message of the Governor, and the Act of Assembly, passed on the 2d of April, 1803.

Mr. Lewis objected to this law as being an *ex-post facto* law. If it was not an *ex-post facto* law, he would thank the gentleman to give him a definition.

Mr. Franklin. I have mentioned that the State of Pennsylvania has uniformly opposed the principle, and produce this act, as part of the proof of that position.

Mr. Ingersoll. An *ex-post facto* law, is, when after an action, indifferent in itself, is committed, the Legislature, then, for the first time, declares it to have been a crime, and inflicts a punish-

ment upon the person who has committed it. But we do not produce this to shew what the law is, but to establish, that the State is a party to the controversy, and has always resisted the claim.—What we purpose to read, is prior to the mandamus and writ by which Mrs. Sergeant is imprisoned.

Chief Justice. If the strict rules of law had been observed, many things which have been read, would not have been admitted—but I have no objection to hear this message and law. *Mr. Franklin* then read the Message and Act, as follows:

"The secretary will, at the same time, present you with copies of a sentence or decree of the honourable *Richard Peters*, esquire, judge of the District Court of the United States, in and for the district of Pennsylvania, in a cause wherein *Gideon Olmsted*, and others are libellants, against the surviving executrixes of the late *David Rittenhouse*, esquire, deceased, respondents.

"Having had knowledge of the cause, and all the circumstances attending it, twenty-four years ago; I cannot, in duty to the Commonwealth, silently acquiesce in some of the former or late proceedings therein. By the ingenuity exercised in this business, "an Act of Congress," "An Act of the General Assembly of the State," and "a verdict of the jury," are held for naught: by a strained construction, the treasurer of the State is converted into a stake-holder, and a sentence given in favour of the libellants, without any summons, notice to, or hearing of the Commonwealth of Pennsylvania, the other only real party, whose interest may be thereby affected to the amount of near 15,000 dollars.

"The Commonwealth, not being made a party to the suit, cannot sustain an appeal to the Supreme Court of the United States; and resistance would be extremely disagreeable, though the whole process should be held as *coram non judice*, which must be the case, if it had been made a party; (for, by an amendment of the constitution of the United States, of the 21st December, 1793, it is declared, "that the judicial power of the United States, shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States, by citizens of another State, or by citizens or subjects of any foreign State,") and as this decree has been passed during

the session of the General Assembly, to *wit*, on the 14th of the present month, I have conceived it my duty to lay the affair before you, for advice and direction.

"The whole transaction will be satisfactorily understood by a reference to *Dallas's Reports*, vol. 2, p. 160, and to the decree itself."

"An act relating to the claim of this commonwealth, against Elizabeth Sergeant and Esther Waters, surviving executrixes of David Rittenhouse, esquire, deceased.

"Whereas by an Act of Congress for the erecting of tribunals, competent to determine the propriety of captures during the late war between Great Britain and her then colonies, passed the twenty-fifth day of November, one thousand seven hundred and seventy-five, it is enacted in the fourth section thereof as follows, viz. "That it be and is hereby recommended to the several legislatures in the United Colonies, as soon as possible, to erect Courts of Justice, or give jurisdiction to the Courts now in being, for the purpose of determining concerning the captures to be made aforesaid, and to provide that all trials in such case be had by a jury, under such qualifications as to the respective legislatures shall seem expedient;" and in the sixth section thereof as follows, viz. "That in all cases an appeal shall be allowed to the Congress, or to such person or persons as they shall appoint, for the trial of appeals:" and whereas by an act of the general assembly of Pennsylvania, passed the ninth day of September, one thousand seven hundred and seventy-eight, entitled "an Act for establishing a Court of Admiralty," appeals were allowed from the said Court in all cases, unless from the determination or finding of the facts by a jury, which was under the provisions of that law, to be without re-examination or appeal: and whereas by a resolution of Congress, of the fifteenth day of January, one thousand seven hundred and eighty, it was among other things declared, that trials in the Court of Appeals should be according to the law of nations and not by jury: and whereas the British sloop Active, having been captured as prize on the high seas, in the month of September, one thousand seven hundred and seventy-eight, and brought into the port of Philadelphia, and there libelled in the Court of Admiralty of the said State, held

before George Ross, esquire, the then judge of the said Court, on the eighteenth day of the said month of September: and whereas the libellants then and there against said sloop Active, were Gideon Urmsted or Olmsted, Artimus White, Aquila Rumsdale and David Clarke, who claimed the whole vessel and cargo as their exclusive prize: Thomas Houston, master of the brig Convention, a vessel of war belonging to Pennsylvania, who claimed a moiety of the said prize for the State of Pennsylvania, himself and his crew: and James Josiah, master of the sloop Gerard, private vessel of war, who claimed one fourth-part of the said prize for himself, his owners and crew: and whereas all the facts respecting the said capture being submitted to the said Court of Admiralty, and a jury then and there returned, impanelled and sworn, a general verdict was brought in by the said jury, which was confirmed by the Court, whereby Gideon Olmsted, Artimus White, Aquila Rumsdale, and David Clarke, became entitled to one fourth of the said prize; Thomas Houston, for himself and crew became entitled to another fourth; the State of Pennsylvania as owner of the vessel of war the Convention, to another fourth; and James Josiah for himself and owners, and crew of the sloop Gerard, became entitled to the remaining one fourth part of the said prize: and whereas the said Gideon Olmsted, Artimus White, Aquila Rumsdale, and David Clarke, being dissatisfied with the verdict and sentence, aforesaid, did appeal from the said Court of Admiralty of Pennsylvania, unto the Court or Committee of Appeals appointed as aforesaid under the authority of Congress, notwithstanding the recommendation of Congress aforesaid, of the twenty-fifth day of November, one thousand seven hundred and seventy-five, for the appointment of Courts of Admiralty in each of the *then* United Colonies, did expressly provide, that all trials respecting capture, should be had by jury, and under such qualifications as to the respective legislatures should seem expedient, and notwithstanding the Court of Appeals did decide not by a jury, but by the usage of nations, and notwithstanding the law for establishing the Court of Admiralty of Pennsylvania, did expressly take away the right of appeal, where the facts were found and determined by the intervention of a jury, and not-

withstanding this State was authorized at the time to make such qualification or provision, taking away the right of appeal in jury cases, by virtue of the recommendation of Congress aforesaid, which allowed and recommended the said Courts of Admiralty to be established with a jury under such qualifications, as to the respective legislatures should seem expedient: and whereas the said Court of Appeals of the United States, on the fifteenth day of December, one thousand seven hundred and seventy-eight, did reverse the sentence of the Court of Admiralty, aforesaid, and did decree the whole of the said prize to the appellants; and whereas, the judge of the Court of Admiralty, to wit, George Ross aforesaid, did refuse obedience to the decree of reversal, and did direct Matthew Clarkson, then Marshal of the said Court, to pay part of the proceeds of the said prize, to the amount of 11,496l. 9s. 9d. Pennsylvania currency, for the use of the State of Pennsylvania, into the treasury of the State of Pennsylvania, whereof David Rittenhouse was then treasurer, taking a bond of indemnity from the said David Rittenhouse, as treasurer aforesaid, to save him, the said George Ross, his executors, administrators, &c. harmless from the consequences of such payment, which bond is dated the first day of May, 1779; and whereas the said George Ross dying, suit was brought against his executors in the Court of Common Pleas of Lancaster County, by and on the part of the appellants before-named, for the money whereunto they pretended title by virtue of the decree aforesaid, of the Court of Appeals, reversing the sentence of the Court of Admiralty, whereof the said George Ross had been judge; and whereas it does not appear that the said David Rittenhouse had any notice or information, or was in any legal way apprized of or made a party to the said suit, in the Court of Common Pleas of Lancaster county, either in his personal capacity or as treasurer of the State of Pennsylvania, so that judgment was obtained by default against the executors of the said George Ross, without any knowledge of the said David Rittenhouse, or his being able to take any measures on behalf of himself or the State of Pennsylvania, to prevent the same: and whereas in consequence of the judgment so obtained in the said Court of Common Pleas of Lancaster County, against the

executors of the said George Ross, the said executors brought suit against the said David Rittenhouse, which in the year 1792, in the term of April of the same year, was heard and determined in the Supreme Court of Pennsylvania (on a case stated for the opinion of the Court, after verdict taken for the plaintiff subject to that opinion) by Thomas M'Kean, chief justice, and others, the judges of the said Court, who among other things thereunto relating, did decree and determine that the reversal as before mentioned, had and made in the Court of Appeals was contrary to the provisions of the act of Congress, recommending the establishment of Courts of Admiralty, and of the General Assembly of the State of Pennsylvania, in their act for the establishment of the said Court, and was extra-judicial, erroneous, and void, and that the Court of Common Pleas of the County of Lancaster was incompetent to carry into effect the decree of the Court of Appeals, and that the judge of the Court of Admiralty aforesaid, George Ross, was not liable to an action in a court of law, for distributing money according to his decree as judge of the said Court; and whereas, at the second session of the third Congress of the United States, held at the City of Philadelphia, in the month of December, 1793, it was proposed as an amendment to the Constitution of the United States, that the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of a foreign State, which having been adopted by the requisite number of States, as appears by the communication to Congress of the *then* President John Adams, to this purpose, of January the eighth, 1798, did become a part of the Constitution of the United States, and whereas, on the 27th day of May, 1802, the said Gideon Olmsted, Artimus White, Aquila Rumsdale, and David Clarke, by their attorney, William Lewis, Esq. did file a bill in the District Court of the United States at Philadelphia, for the District of Pennsylvania, before Richard Peters, judge of the said Court, against Elizabeth Sergeant and Esther Waters, surviving executrixes of David Rittenhouse aforesaid deceased, for the recovery of the monies with interest so paid into the hands of the

said David Rittenhouse, by Matthew Clarkson, Marshal of the Admiralty Court, aforesaid, as proceeds of the prize, the brig Active, so captured as aforesaid, and by the said David Rittenhouse and his executrixes aforesaid, formerly and still retained; and whereas in the answer of the said Elizabeth Sergeant and Esther Waters to the bill aforesaid, it sufficiently and substantially appears, that the said money was originally received by the said David Rittenhouse, and was by him detained as treasurer of the Commonwealth of Pennsylvania, which Commonwealth was and still is interested in, and a claimant of the same under a decree of the said George Ross, as judge of the Court of Admiralty in manner as herein before stated: and whereas the said Richard Peters, judge of the said District Court, on the bill, answer and replication so filed by and between the said Gideon Olmsted, Artimus White, Aquila Rumsdale and David Clarke, of the one part against Elizabeth Sergeant and Esther Waters, executrixes as aforesaid, did on the fourteenth day of January, one thousand eight hundred and three, proceed to decree as follows, viz. " This is the long depending case of the sloop Active and cargo, it comes before me by libel filed against the executors of the late Mr. Rittenhouse, who received from George Ross, esq. then judge of the State Court of Admiralty, the sums mentioned in the libel, which were invested in the certificates of stock as stated therein; Mr. Rittenhouse on receiving these certificates, which were the proceeds of the sales the said sloop and cargo, gave a bond of indemnity to Mr. Ross, which is now offered when payment of these proceeds is made to be delivered up, the suit is instituted for the purpose of carrying into effect a decree of the Court of Appeals established under the old Confederation, a copy whereof appears among the exhibits; in the answer it is alleged, that the monies were received for the State of Pennsylvania; in the replication this is denied; in a memorandum made by Mr. Rittenhouse, at the foot of the account exhibited, it appears that he intended to pay over these proceeds to the State when indemnified; no such payment ever has been made, and the certificates and monies are yet in the hands of the respondents: it appears to me, that Mr. Rittenhouse considered himself, as I conceive he was, a stake-

holder, liable to pay over the deposit to those lawfully entitled thereto; his executrixes conceive themselves in the same predicament, and have declined paying over the said certificates and interest; no counsel have appeared and requested to be heard on the part of the respondents, and I am left to judge from the libel, answer, replication and exhibits which contain the state of the fact. If I should be thought mistaken in the opinion I form on the subject, there is time and opportunity to appeal to a superior tribunal; I throw out of the case all circumstances not immediately within my present view of the duty I have to perform; I have nothing to do with the original question that has been decided by the Court of Appeals, nor does it appear to me essential for me to determine with what intentions Mr. Rittenhouse received the certificates, the fact of the certificates and interest being now in the hands of the respondents, is granted by them in their answer; it has been determined by the Supreme Court of the United States, that this Court has power to effectuate the decrees of the late Court of Appeals in prize causes, and this Court has on several occasions practised agreeably to that decision; there is no doubt on my mind, (the authorities in the books being clear on this point) that the process and jurisdiction of this Court, will reach and extend over the proceeds of all ships, goods and articles, taken as lawful prize, found within the district and legally proceeded therein, these proceeds are under the same legal disposition, and subject to the same responsibility, under whatever shape they may appear, as the original thing from which they were produced; it is conceded that the certificates and money in question are the proceeds of the sloop and cargo, in the libel mentioned, these were decreed to the libellants by the judgment of the late Court of Appeals:

"I am therefore of opinion, and accordingly decree, and finally adjudge and determine; that the certificates be transferred and delivered, and the interest monies paid over by the respondents to the libellants, in execution of the judgment and decree of the Court of Appeals, as stated in the proceedings in this cause with costs; I make it however a condition, that the bond of indemnity be cancelled or delivered to the respondents, on

their compliance with this decree. Signed, Richard Peters." All which legal proceedings herein before stated, will more fully and at large appear, on reference to the records of the respective courts wherein the same were had: therefore it hath become necessary for the General Assembly of Pennsylvania, as guardians of the rights and interests of this Commonwealth, and to prevent any future infringements on the same, to declare; that the jurisdiction entertained by the Court or Committee of Appeals over the decree of George Ross, as judge of the Court of Admiralty of Pennsylvania, in the suit where the claimants of the brig Active as prize were the libellants, as herein before stated, was illegally usurped and exercised in contradiction to the just rights of Pennsylvania, and the proper jurisdiction of the Court of Admiralty established as aforesaid, under the authority of this State, and that the reversal of the decree of the said George Ross, in that suit, was null and void, that the jurisdiction entertained by Richard Peters, judge of the District Court aforesaid, in the suit of Gideon Olmsted, Artimus White, Aquila Rumsdale and David Clarke, against Elizabeth Sergeant and Esther Waters, surviving executrixes of David Rittenhouse, deceased, was illegally usurped and exercised, that the rights of this Commonwealth as a claimant, and as the party substantially interested in the said suit, though apparent on the face of the proceedings, were unfairly passed over and set aside: that the said David Rittenhouse was not, and ought not to have been considered in the light of a mere stakeholder, but as the treasurer and agent of this Commonwealth, and that the jurisdiction and decree of the said Richard Peters, thereon, were entertained, and made in manifest opposition to, and in violation of the last amendment of the Constitution of the United States, herein before stated, and ought not to be supported or obeyed: therefore,

"SECTION 1. *Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by the authority of the same*, That the Governor of this Commonwealth be authorized, and he is hereby authorized and required, to direct the Attorney

General of this Commonwealth, to apply without delay to Elizabeth Sergeant and Esther Waters, executrixes as aforesaid, and require them forthwith to pay into the treasury of this Commonwealth the monies by them admitted to have been received in respect of the premises, in their answer to the bill so as aforesaid filed against them, in the District Court of Pennsylvania, before Richard Peters, judge of the said Court, without regard to the decree of the said Richard Peters, thereon, and in default thereof by the said Elizabeth Sergeant and Esther Waters, to direct the said Attorney General to bring suit in the name of the Commonwealth, in the proper Court of this Commonwealth, against the said Elizabeth Sergeant and Esther Waters for the moneis aforesaid, and proceed as speedily as the course of legal proceedings will permit to enforce the recovery and payment thereof, into the Treasury of this Commonwealth.

"Section II. *And be it further enacted by the authority aforesaid*, That the Governor of this Commonwealth be authorized and required, and he is hereby authorized and required, to protect the just rights of the State, in respect of the premises, by any further means and measures that he may deem necessary for the purpose, and also to protect the persons and properties of the said Elizabeth Sergeant and Esther Waters from any process whatever, issued out of any Federal Court, in consequence of their obedience to the requisition, so as aforesaid directed to be made to them, by the Attorney General of this Commonwealth; and in the name of this Commonwealth, to give to the said Elizabeth Sergeant and Esther Waters, a sufficient instrument of indemnification in case of their payment of the monies aforesaid, in compliance with this act, without suit brought against them on the part of this Commonwealth, for the recovery of the same."

Mr. F. concluded—This act was passed by a very large majority of both houses—I think, therefore, in every view of the case which I am able to take, that the process issued by the United States, is void, and, that therefore, Mrs. Sergeant ought to be discharged.

Mr. Peters then read a part of the peremptory mandamus—and also, the opinion of the Supreme Court of the United States.

Mr. Franklin mentioned to the court, that the guard was withdrawn from Mrs. Sergeant's house.

Mr. Lewis then addressed the Chief Justice as follows:

Before I proceed to consider the merits of this case, I wish to ask your Honour how far you mean to go into the question. You are sitting as Chief Justice of the Supreme Court of Pennsylvania to enquire whether Mrs. Sergeant, is legally or illegally detained in imprisonment.

It appears from the papers and process referred to by the return to the *Habeas Corpus*, that this was a *prize* cause and was decided in a *prize* court. There the Judge determines the law and the fact. If the parties are dissatisfied, two remedies are pointed out by law, one, an appeal to the Circuit Court and thence to the Supreme Court of the United States; the other, to apply to the Supreme Court of the United States for a prohibition.

The present question has been decided in the District Court of the United States, and afterwards, by way of appeal, in the Supreme Court of the United States. The same principle has also been determined in the Supreme Court of this State, and the Supreme Court of the United States, on an appeal from the District Court of New Hampshire. I wish therefore to enquire, if your Honour feels yourself at liberty to proceed to an investigation of the case, and how far you mean to go into the question. I am aware that the King's Bench of England exercises a regulating power over all the other Courts of Westminster Hall, and keeps them within the bounds of their authority, but that is not applicable to the present case. If your Honour has the right, as Chief Justice, to discharge from executions issued by the Courts of the United States, so have the Judges of those Courts from yours; further, if you, as Judge, have that power, so has every Judge of the Common Pleas, and thus under pretence of want of jurisdiction, we shall find, not an enlightened Chief Justice of the Supreme Court, but an ignorant Associate discharging from executions issued by superior jurisdictions. In cases even of foreign judgments a different rule has hitherto prevailed, they have always been considered as conclusive. [See Dall. Rep. 231. Rapelie *v.* Emery.] But according to the principle contended for by my opponents, those Courts will be continually discharging from your process and you from theirs. The

only legitimate mode would have been, to bring forward all the evidence before the District Judge, and to have appealed thence to the Circuit and Supreme Courts of the United States. All the books say, that not the Court *a quo*, but *ad quem*, are to decide if the appeal lies. I shall therefore stop here, to know if it is necessary to take up the objections that have been advanced, especially as this Court could not decide a *prize* cause, even if they had all the evidence before them.

Chief Justice. I think it best to argue the cause in all its points. I would not say, that where it appears from the record that the Court had no jurisdiction, that I would not interfere. I wish to hear you on that point. The clashing of jurisdictions is so great an evil in its consequences, that I shall, and I hope every judge will be careful how he decides.

Mr. Lewis continued. It is not my intention to take up a great length of time ; my reason is this, if when the circumstances and facts of this case are understood, it does not appear most clearly, that the Federal Court had complete jurisdiction of the matter, I despair making it any plainer by what I shall advance. It has been decided in the District Court of the United States ; it has been decided in the Circuit Court of the United States ; and again in the Supreme Court of the United States ; and not a single dissenting voice, of a single dissenting judge, has been heard upon the subject : after this I am sure due reflection will take place, before a single Judge will say, that all the enlightened characters who sat in these courts were *wrong*, and he alone is *right*.

The first question that presents itself is, Had the Court of appeals in prize causes jurisdiction ?

The act of Assembly forming Admiralty Courts gives no appeal from the decision of a Jury; but I take the true construction of that regulation to be, where the facts are found by *special verdict ;* but whenever there is a *general verdict*, which involves *law* and *fact*, this regulation was not meant to apply. It is said, that the Court of Appeals had no jurisdiction in prize causes, unless it be given them by the State Legislatures, which they have not done ; but I take the reverse of this position ; I say the Legislature never had that jurisdiction—and thus I prove it :

They did not possess it before the revolution, because they were dependent on the British crown. The King alone had the right of war and peace, and whenever war broke out, he issued his commissions of prize jurisdiction; proof of this cannot be necessary; so far then up to the revolution; when that took place the British Parliament levelled their power, not against one, but the whole of the colonies; then it was that the people took upon themselves the exercise of a right they held under no charter but from nature, and nature's God. Chartered liberty was then no boundary. I admit that Pennsylvania might then have made her election to stand on her own ground. When the bonds of union were thus burst asunder, each State might have formed its own government, raised its own army, and manned its own fleet; appointed its own commander, and formed its own treaty and alliance. But wild and foolish would have been such a scheme. The rulers of those days were different from those we have now. They united together; one great and general mass of this vast continent joined to repel the attempts of their powerful aggressors. The Legislatures of the several Colonies had before that time, the right to legislate on all *domestic affairs*, but not on *war* and *peace*, or its incidents. When clouds were lowering on our country, it was no time to distract affairs by trusting the State Legislatures, who were mostly too much attached to the British. The people appointed their Colonial committees, their County committees, their Town committees; they would not have a monster with thirteen heads and thirteen tails; but one supreme body, which they denominated the "*Congress of the Nation.*" This Congress had *unlimited powers;* it was to deliberate for the public good, and act as in its wisdom it thought proper. It began by humble petitions to our oppressor; they were answered with neglect and contempt; it then made more firm and determined remonstrances Was this course pointed out to the members by their constituents? Were there any instructions as to what they were to do? Is any such thing to be found on record? No such thing. Nothing specific was pointed out to them. They were told, "the state

of affairs is alarming—go on." They found there was nothing to be obtained by humble petitions, nor by more firm and determined remonstrances; they did not then vest in each State the right of war and peace. What did they do? Why this great head of this great nation, raised an army. It assigned to each State its *quota* of troops, not as *separate armies*, but as *parts* of the same *general army*. This army was commanded by *one* illustrious veteran.—By whom was he appointed? By *Congress*. By whom were the other officers appointed? All, except some of low degree, by *Congress*. If it had been otherwise, if the State Legislatures possessed this power; and we had had as bad a one then as we have now, God only knows what would have been the issue. Who appointed Courts Martial? Congress. Who fitted out our navies? Why Congress. To be sure it was not a very respectable one, but such an one as the times and circumstances would admit. Congress was the supreme, the sole actor. When Governor Rutledge appointed a commander to a letter of marque, a resolution of Congress was necessary to confirm the appointment. [See the 3d. vol. of Journals of Congress, 113, 114] In fine, Congress was at the head of affairs; Congress, and Congress only, fitted out the navy; it established rules and regulations for their government; and so fully sensible were the people at that time, of this one general defence, that all foreign ministers and embassies were sent to, and appointed by them. They formed alliances of offence and defence. And when the British, with Lord Howe at their head, held out the principles now advocated by the Attorney General, that he would treat with the Colonies *separately*, Congress passed a resolution disapproving of the measure—no man was found base enough to comply! It is for these reasons I say, that these great men were right in their decisions, and the State Legislatures never had the powers assumed by them. I hope I have shewn that the people did not vest it in the State Legislatures; and therefore, it remained in the general Government—that this general body had the right of *war* and *peace*, and the others are the necessary consequences of the right of war and peace; because war and peace involve all those. It answers nothing to

ask where Congress derived this right; there is no such commission; we must enquire what was the will of the people, or common law of the day.

So it remained until 1778, when the State legislature disputed it. This was, to use the words of that celebrated law, "an usurpation of power." These are my reasons for saying that if that point is not most clearly made out by stating it, I despair of making it so. I have not made a single note, except what I took of Mr. Attorney General's speech.

We are told that the resolution of Congress was *recommendatory* to the States. It was, I admit *recommendatory*, as to the appointing the Courts; but *not so*, as to the *appeal*. Suppose this injury had been done by the people of this country to a *foreigner*, what would have been the consequence? Would the injured individual have come cap in hand, to a pitiful Governor of a pitiful State, if any such there were? No! To Congress would he apply; because they, and they only are known to foreign nations. What a set of blockheads then, must they have been, to place the safety of the nation, with an ignorant Governor and a wild fanatical Legislature, for such there *may* be among us. I say then, that Congress *recommended* the trial by jury, but only meant it to be final in cases of *special verdicts*. But I go further, owing to the innovations on the trial by jury; before that time, the Congress were as anxious to *support*, as the democrats of this day are to *destroy* this trial. But they, well knowing, that these juries would know as little about the laws of nations, as some of our modern patriots do of chevy-chace, made the decision of a *general verdict* always liable to an *appeal*. An appeal naturally decides again the *facts*, as well as the *law;* there is no such thing as a writ of error by the civil law, they are always heard by appeal, Congress therefore do not *recommend* but *expressly declare* there shall be an appeal—At the time of passing these resolutions, Congress might have constituted Admiralty Courts in each State, but that would have been needless and expensive. The State Legislatures could do it quite as well, and œconomy was a necessary virtue not as at this time, in *words*, the order of the day, but

substantially so, from necessity. God grant that the days of '76, of which we hear so much, may return and the trial by jury be respected as heretofore.

No Colonial Legislature before had, nor State Legislature since the revolution, has power to establish *prize Courts;* but Congress had and have it as an implied power necessary to the right of *war* and *peace.* We will (said they) have it in our power to reverse unjust decisions. An appeal was had in the case of Stackpole from Rhode Island. In the Active, it was so decided by three Judges. Mr. M'Kean says he was present in this case, but he is mistaken; his memory has failed him, he was not present; In the case of Stackpole, he was not only present, but was one of the Judges who signed an opinion on this point. [*Mr. Ingersol.* For his sake I wish you to produce it.] I had it, but could not lay my hands on it when I was coming to Court, I think I lent it to Mr. Peters. In the case of Lousanne, of New Hampshire there was the same point. In Pennsylvania a variety, an innumerable number of cases can be shewn where appeals were allowed. Whether denied or not by the State Legislature is of small consequence, if it appears that all these Judges were right; if they were wrong, I have nothing more to say. In Doan's case it was urged in the Supreme Court of the United States, that he had obtained the decision of the State Court, and thereby waived his appeal: that was abundantly stronger, and yet the appeal was allowed. Great opposition was made. "You should come forward in the first instance," said the opponents; no said many members of Congress, yet in that case the decision was with us. 3 Dallas 79 is a case to which I beg leave to refer the Court.

[Here Mr. Lewis read the opinion of Judge Patterson; when he came to that part of it, where the Judge says, "the pleadings consist of a heap of materials thrown together, in an irregular manner," this was done, said Mr. Lewis in a low voice, in New-England: when he came to that part where the Judge says, "pleadings are founded on good sense;" he observed, how differently men think at the present day! when he read that part of the opinion, which states, that the decision of a jury might involve the United States in hostilities; God grant, said he, that is not the intention in the present case.]

You will perceive, this is the reasoning of Judge Patterson, a man of sound integrity, and as clear a head as ever sat upon any bench. An appeal was made to Congress, the 13th of January, 1779, as may be seen by the Journals of Congress; and the Legislature of New-Hampshire, having more sound sense and law knowledge, with less philosophy, allowed the appeal.

To the second point of Mr. "Attorney General," I will read the opinion of Chief Justice Marshall, a man much abused, but as firm a republican, and as clear a head as any man in the Union. [Here Mr. Lewis read the opinion of the Supreme Court of the United States.] It would have been curious if my client had been a foreigner; Congress would then have had to pay the money or go to war.

Suppose the amendment of the Constitution had not taken place, could we have sued the State for this money? Suppose the estate of Mr. Rittenhouse was (as I am happy to say it is not) insolvent; would the State have been bound to pay us the money? Most certainly not. The indorsement of Mr. Rittenhouse, was a mere *designatio personæ;* he put the certificates in a wrapper, and left them to his daughter, it would therefore be nonsensical (my opponents will excuse me, I do not mean to apply the term to them) to suppose the State could be sued. It is said, that the money was brought into Court; but all money brought into the Court, must be paid to the *Clerk*, and not to the *Judge;* and Judge Ross had no more right to receive the money, than your Honour would have a right to receive money paid into the Court, over which you preside, with so much honour and integrity. Then all this noise and nonsense, together with the shameful report of the House of Representatives of the State, being tricked out of her money, is too contemptible to merit an answer. And here let me mention a circumstance, of which the District Attorney reminds me: In the suit brought by the State, against the representatives of Rittenhouse, this sum was never brought forward as an item. [Mr. Dallas said, that he only meant to say, that this was not brought forward as a charge against Mr. Rittenhouse by the State, and a balance was then found due to Mr. Rittenhouse, which was paid him.) This is a determination, or rather an unanimous decision of the Supreme

Court of the United States. I need say nothing in favour of the probity and talents of the Chief Justice ; he has been abused in the Democratic papers, and that is enough.

These certificates were known by an ear mark. Olmsted had therefore a right to follow this very property, in whosesoever hands they might come. The doctrine contended for on the other side is strange indeed ; suppose a man seizes my horse, or my carriage, or any other property that I possess, and gives it into the hands of the *State Treasurer* ; it is said, that I cannot follow it into his hands. Suppose a man dispossesses me of my house, and places the *State Treasurer* therein, am I tamely to submit to this loss of property. PREROGATIVE, PREROGATIVE! We have been in the habit hitherto of abusing prerogative, but this is something more than prerogative, it is TYRANNY and OPPRESSION.

In the law of 1803, among many other extraordinary things, is contained the following, namely : " And whereas the libellants, then and there against the said sloop Active, were Gideon Urmsted or Olmsted, Artimus White, Aquila Rumsdale and David Clarke, who claimed the whole vessel and cargo as their exclusive prize." This is untrue. It is shamefully false ! This immaculate Legislature of this immaculate Commonwealth has stated an untruth! *They* went thither, and not we ; *they* dragged us there, and we went only to obtain a confirmation of the Decree made at their instance. This ought to cover with disgrace this immaculate Legislature. They appear with a cloven foot, and disguise their act with this shameful falsehood. It was for this reason I asked the Attorney General, if he would be answerable for the truth of what he read. I have not, as I said before, made a single note, I spoke from the impulse of the moment, and if I have expressed myself with more warmth than usual, it was, because this *shameful*, this *scandalous* law has been read against me.

Chief Justice to Mr. Ingersoll.

I hope in your observations, you will not make any personal reflections. I wish to hear all your arguments, but a retaliation in that particular, will be of no use to your clients, and is very disagreeable to me.

Mr. Ingersoll. Astronomers observe late alterations in the heavenly bodies, which some say indicate great changes if not final dissolution. Correspondent symptoms appear in our little system; the revolutions of the planetary States round their central sun, the Union, are performed with less harmony than heretofore—and if due order is not preserved, whether the irregularity is occasioned by the deviation of one or other of the parts, the consequences will be equally fatal to both, and to the whole. [Mr. Ingersoll said he would comply with the request of the Chief Justice, and say nothing personal or severe, for he could not help thinking that at this time, when the Legislature were complaining of the Bar, it would have been better for the Hon. Gentleman who preceded him, to have said nothing against the constituted authorities of the Country.] In the year 1778, the State of Pennsylvania claimed the property now in controversy, and the claim was not of so late date, as Mr. Lewis supposed; the dispute commenced 28th December, 1778. [See Decree of 12th December, 1778.] The Judge and Jury in the Court of Admiralty of this State, decided in favour of the State; the Court of Appeal reversed the decision, and the Judge paid the money to David Rittenhouse, *Treasurer of this Commonwealth*, by order of the Supreme Executive Council, and the House of Representatives. [Here he read those orders.]

By the amendment of the Constitution, moved and proposed December 2d 1793, and adopted by a requisite number of States, 14th January, 1798, It was resolved, "that the Judiciary power should not be considered as extending to suits against one of the United States: and the Courts of the United States determined, that it not only superseded their jurisdiction against States, in suits previously brought, but prevents the institution of such suits in future. [see 2 Dallas's reports, 459, and 3 Dallas's reports, 378, 382.] In the present case—two questions offer themselves for consideration.

First. Had the Federal Courts jurisdiction in the suit of Gideon Olmsted, against Mrs. Sergeant and Mrs. Waters?

Secondly. Is process emanating from a Court, not having jurisdiction of the cause, voidable only, or absolutely void; and can that question be decided upon in the present proceeding?

If Judge Peters had jurisdiction, all further argument must be abandoned; but the reverse is the case.

Chief Justice. It is correct, if the Court had jurisdiction, then their proceedings cannot be examined.

Mr. Ingersoll then contended—That it was a necessary consequence of our Federal system, that the State, and United States Courts, must judge of the extent of their own, and each others jurisdiction.—That the opinion of the Sup. Court of the U. States, was founded on the *supposed* fact, that Mr. Rittenhouse held the property in controversy, not as a *Treasurer*, but as a *Stake-holder* in his *individual character*; and therefore, the proceedings in the Court, were not against the State: he denied the premises and conclusion that Mr. Rittenhouse held the fund in his *private capacity*, but as the principal revenue and fiscal officer of the Commonwealth; as agent, not claiming interest in it. If at first, the circumstances were doubtful and equivocal, subsequent incidents might confirm or propel inferences either way; if the evidence is at first of a precise and decided nature, the burthen of proof devolved upon his opponents, to shew the change of character. The jurisdiction of the Courts of the United States is special and limited, though Supreme. The Courts of the United States decide on the Constitutionality of the proceedings of the State Legislatures, and determine on the degree and extent of their operation.—In Hilton's lessee *vs.* Brown, they adjudged an Act of Assembly, passed in 1783, as null and void; being contrary, as they supposed, to the Treaty of Peace, between the United States and Great Britain, as settled by preliminary articles the preceding Autumn.

The Constitution of the United States declares, that "the judicial power shall extend to all cases affecting Ambassadors, other public Ministers and Consuls. By Acts of Congress, this jurisdiction of the Courts of the U. States is not concurrent, but entirely and altogether conclusive, of the State Courts in all cases respecting Consuls. If the Supreme Court of Pennsylvania, were to give judgment against a Consul on argument, and an execution to issue, a single Judge of the United States' Court, would discharge the defendant out of the custody of the Sheriff, on an *Habeas Corpus*. By the declaration of Independence, these then United States, it was announced to the world, were, and of

right ought to be, free and independent States.—By the Articles of Confederation, Article 2, it is declared, that each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, not *expressly* delegated to Congress.

The present Constitution, he thought, had provided for pursuing controversies in Federal Courts, between a citizen of one State, against another State. As early however, as the 2nd Monday of December, 1793, Congress, then sitting in this City, proposed as an amendment to the Constitution of the United States. That "the judicial power of the United States should not be construed to extend to any suit in Law or Equity commenced *against* one of the United States, by Citizens of another State, or Subjects of a foreign State. What was the Court to understand by a suit commenced in *Law* or *Equity*, against one of the United States, by citizens of another State, or subjects of a Foreign State? Would it be contended, that these words were not satisfied, unless the State were *nominally* a party, though as directly and immediately interested in the event of the suit as if mentioned—that the Treasurer should be sued to the amount of the whole sum in the public coffers—Mr. Peale should be made Defendant in an Ejectment for the Statehouse, and Trover brought against the Secretary for the Great Seal. Money—house—and the very means of certifying public acts should be taken away, by process of the Federal Courts, from the Commonwealth; and yet the State not named. Maxims crowd upon the recollection to repel so improper an interpretation *Qui hæret in litera, hæret in cortice*—this is a literal, against a fair interpretation, of the Spirit and meaning. A state, a body politick, a Corporation, an invisible body must act by the instrumentality of public officers, and private agents. Through them, naming the Representatives, not the Constituent body, the property, rights and Independence of the individual States, may be as effectually prostrated, without, as by naming them in the suit—Persons equally, or indeed exclusively interested, are often not named: the assignee of a bond, or other instrument not strictly negotiable, is not named in the action, though alone interested. The defendants in Ejectment, may remove their controversy from a State, to a Federal Court, if they claim the land from a State, other than that, in which the suit is brought, under which the State

claims—Who is meant by *party?* the person interested, whether named in the process of ejectment if brought against another person acting as his agent. If either party make affidavit that he claims a grant from a State, other than that in which the suit is pending, and shall move that the adverse party inform the Court which he claims under a grant from the State, in which the suit is pending. [Sect. 12 of the judiciary act] the said adverse party, shall give such information, or otherwise not to be allowed to plead such grant, or give it in evidence upon the trial. By *adverse party* must be intended the persons interested in the controversy, whether their names appear upon the records or not. Here Mr. Ingersoll read from 4 Dallas' report, 412, a part of the opinion of Judge Washington, in these words: "without entering into a critical examination of the Constitution and Laws, in relation to the jurisdiction of the Supreme Court, I lay down the following as a rule: That a case which belongs to the jurisdiction of the Supreme Court, on account of the interest that a State has in the controversy, must be a case, in which a State is neither *nominally*, nor *substantially* the party." Whether the District Court had, or had not jurisdiction in the cause, depends on a construction of the Constitution of the United States. Is there a provision in the Constitution of the United States, that such construction shall be conclusively made by the Judges of the Supreme Court of the United States. [8 Dallas's report, 474.] Will it be said, that upon any other construction there will be conflicts and collision between the judiciaries of the State, and the United States?—No more than in England, between Chancery and the Courts of common law—the King's Bench, issuing prohibitions to the Courts of Admiralty. Not more, than in the same country, on questions of privilege of Parliament, where the house of Commons and Lords have determined one way; and the Courts of common law, in a different manner, the same question. Writing and publishing seditious libels, was resolved by both Houses of Parliament, not to be entitled to privilege of Parliament, and the reasoning on which that case proceeded, extended equally to every indictable offence, [1 Blackstone's Com. 166, 167.] The contrary had been determined a short time before, in the case

of Mr. Wilkes, by the unanimous judgments of Lord Camden and the Court of Common Pleas, [ibid, 22. 2. Wilson, 151.] This was a decision by that luminary of the bar, the friend of liberty and humanity, "Lord Camden," on an *Habeas Corpus*, allowed to issue instantly, returnable forthwith, and Mr. Wilkes was discharged from imprisonment. There is no reason therefore, to apprehend this conflict here, rather than elsewhere. It is true, we have had judiciaries, emanating from both Governments, State and United States; both however, originate with the *people*, the common and only legitimate source of both and all authority.

A crisis has arrived: the alternative presents; the Legislature of Pennsylvania has put one construction upon the Law of the United States, the Supreme Court of the United States on an *ex parte* hearing, has given a different interpretation. It must be agreed that a Legislative construction of the State is not binding; but it is denied peremptorily, that a Chief Justice of Pennsylvania is to be *influenced*, much less *determined*, in his opinion, by what has been said on the point, by the Federal Judiciary. The Constitution of the United States is Federal; it is a league or treaty made by the individual States, as one party, and all the United States as another party. Upon an independent exercise of judgment under the writ of *Habeas Corpus*, the great and efficacious writ in all manner of illegal confinement, depends the personal liberty of the subject; 3 Blacks. Comm. 131, 133. That liberty which is a *natural inherent right*, which can neither be surrendered nor forfeited, unless by the commission of a crime, and which ought not to be abridged in any case, without the special permission of law—a doctrine coeval with the rudiments of the Common Law, and handed down through the successive struggles of Saxons, Danes, and Normans, and not to be yielded in this asylum of liberty. The syllogism is short and plain; all heads can reach it, and all hearts conceive it. The Federal Courts have not jurisdiction where a State is a party. In the controversy of Gideon Olmsted the State was and has been a party, these thirty years, so avowed to all the United States of America—a question of

property between these two, and they were the parties to the controversy, in the words of the Constitution. These are the premises; from such a major and minor the inference is plain, in substance as well as form; therefore the Federal Court had no jurisdiction. And are the daughters of Rittenhouse to be the first victims to the collision of the judiciary of the State and the United States?

The bed of Procrustes was a couch of down, compared with the situation of these daughters of that prodigy of genius: *that* admitted a possibility of ease, *this* does not. While the immortal spirit of Rittenhouse is tracing the wonders of Providence in the heavenly bodies and worlds to us unknown, his daughters, even in this State, so much indebted to his wisdom and worth, are tortured without a possibility of escape. When nations differ neither party has a right to decide; there ought to be found a mutual spirit of accommodation, a mediation of some kind interposed. Is it a *casus omissus* in the great compact that forms the American League and Confederacy? The remedy can only be found in an amendment to the Constitution. Each party has a right to retain its own interpretation until some ruling Council, some indifferent Judge, neither State nor United States, shall interpose healing advice or authoritative opinion. The decisions of the Courts of the United States, will support this position.—that the rule applies—that the State is a party, within the meaning of the Constitution, if interested in the event of the suit, tho' not named. The true meaning of the amendment to the Constitution, is, that the U. S. Court shall not by their decisions affect the States without their consent by being plaintiffs. It is said, that to determine the question of Federal Jurisdiction, you are to inquire, whether the State is not nominally and in form, but substantially interested, and what shows they were *substantially* interested is, the opinion of the Supreme Court of the United States, where they decide, "that if the suggestion in this case be examined, it is deemed perfectly clear, that no *title whatever* to the certificates in question, was *vested* in the *State of Pennsylvania*. [See that opinion in Mr. Peters's pamphlet, page 86.]